In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 5a-6a) is not yet reported. The order of the district court (Pet. App. A, 1a-3a) is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A, 10a-11a) was entered on March 10, 1972. The petition for a writ of certiorari was filed on June 8, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The major issue in this case warranting consideration by this Court is whether the court below erred in holding that a railroad reorganization court has jurisdiction to review an order of the Interstate Commerce Commission authorizing abandonment of a portion of the railroad's line, and in enjoining all parties from instituting or maintaining a suit for review of that Commission order in a three-judge district court convened in another district pursuant to the Urgent Deficiencies Act.

STATUTES INVOLVED

The statutes involved are Section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-(20); Section 77(0) of the Bankruptcy Act, 11 U.S.C. 205 (0); and Sections 1398(a) and 2325 of the Judicial Code, 28 U.S.C. 1398(a) and 2325 (Pet. App. B, 1b-4b).

STATEMENT

The Central Railroad Company of New Jersey (CNJ) filed a petition for reorganization on March 22, 1967, in the United States District Court for the District of New Jersey (the reorganization court). On May 25, 1971, the Trustee of CNJ filed 30 applications with the Commission requesting authority to abandon 30 line segments under Sections 1(18) and 1(20) of the Interstate Commerce Act, 49 U.S.C.

1(18) and 1(20).[1] These applications include CNJ's entire Pennsylvania operations as well as certain of its New Jersey lines. By an order dated August 20, 1971, the Commission summarily authorized CNJ to abandon 10 of the 30 lines. The remaining applications were set for further proceedings before the Commission.[2]

Petitioners, who opposed the abandonment in the Commission proceeding, filed a complaint on September 24, 1971, in the Middle District of Pennsylvania seeking to enjoin and set aside the Commission's order authorizing the 10 abandonments. Before that suit could be prosecuted, however, the reorganization court, in response to a petition for instructions filed by the Trustee of CNJ, issued an order (Order No. 445) directing the Trustee to suspend all of CNJ's Pennsylvania operations by April 1, 1972, even if the abandonment applications were still pending before the Commission and further enjoining essentially all parties from instituting or maintaining any action affecting CNJ's Pennsylvania operations in any court other than the reorganization court.

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[1] The applications were docketed as F.D. No. 26659 and subs 1-29 thereunder.

[2] Of the remaining 20 applications, the Commission, in a decision served June 2, 1972, approved 13 and denied 5 such applications. CNJ had withdrawn 2 applications in their entirety. The matter is now pending before the Commission on petitions for reconsideration.

Petitioners' application to the reorganization court for leave to proceed in the Pennsylvania suit was denied, and the Pennsylvania suit has been continued pending this Court's decision herein. Thereafter, by order No. 451, the reorganization court authorized the Trustee to implement the 10 abandonments approved by the Commission.

On appeal, the Court of Appeals for the Third Circuit affirmed the orders of the reorganization court. Petitioners' applications for stay pending appeal were denied by the court of appeals, and by Mr. Justice Stewart on March 27, 1972.

ARGUMENT

The petition presents an important question of Federal court jurisdiction which is likely to recur in other railroad reorganization proceedings, and which appears to be in conflict with prior decisions of this Court as well as those of other lower Federal courts.

1. At the present time, twelve of the Nation's railroads are in reorganization proceedings in various district courts throughout the country. Several of the proceedings—including those involving the Penn Central,[3] the Reading,[4] and the Lehigh Valley[5]—are

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[3] *In the Matter of Penn Central Transportation Company,* Bankruptcy No. 70-347, E.D. Pa.

[4] *In the Matter of the Reading Company,* Bankruptcy No. 71-828, E.D. Pa.

[5] *In the Matter of Lehigh Valley Railroad Company,* Bankruptcy No. 70-432, E.D. Pa.

in courts located within the Third Circuit. The decision of the court below has already been cited by a major creditor in the New Hope and Ivyland reorganization proceeding, seeking an order directing the Trustee of that railroad to suspend operations,[6] and the issue of the reorganization court's power to review an abandonment order and to enjoin review by other courts can similarly be expected to arise in other reorganization proceedings. Plainly, this is a matter of sufficient importance to warrant plenary consideration by this Court.

2. The question presented is important to the lower Federal courts in defining their respective jurisdictions, and cannot be resolved without guidance from this Court. The reorganization court's orders are in no way binding on the three-judge district court in the Middle District of Pennsylvania and thus both courts *could* have proceeded simultaneously. The fact that the Pennsylvania court has stayed its hand here does not detract from the possibility that it could have acted and reached a different result than the reorganization court. See *New Haven Inclusion Cases*, 399 U.S. 392, 419 (1970).

3. The decision of the court below is in conflict with this Court's decision in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946). In *Thompson*, this Court held that "[c]arriers being reorganized

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[6] *In the Matter of New Hope and Ivyland Railroad Company, Debtor*, Bankruptcy No. 70-324, E.D. Pa., Motion of Southeastern Pennsylvania Development Fund for Order Directing Trustee To Suspend Operations, filed August 1, 1972.

under § 77 of the Bankruptcy Act are not exempt from" the provisions of § 1(18) of the Interstate Commerce Act, which requires that no carrier may abandon all or any part of its operations unless and until the Commission has issued an order authorizing it to do so. (328 U.S. at 144). And, in language directly applicable to the case at bar, this Court emphasized that "[i]f the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See *El Dorado Oil Works* v. *United States*, 328 U.S. 12." (328 U.S. at 151, fn. 11). The "manner provided by statute" is, of course, that such orders are only "reviewable by a district court of three judges." (*El Dorado*, 328 U.S. at 19). Here, in contrast, the reorganization court has asserted jurisdiction to review the Commission's abandonment order, and has enjoined the parties from seeking review before a three-judge court, as provided by statute. Plainly, this is contrary to this Court's *Thompson* decision.

Other lower courts dealing with similar issues have consistently followed the rationale of this Court in *Thompson*, holding that orders of the Commission in cases involving passenger train discontinuances of a railroad in reorganization (which are analogous to abandonment cases) are subject to review only by a statutory three-judge court and not by the reorganization court. In *Commonwealth of Pennsylvania* v. *United States*,[7] a three-judge dis-

[7] Civil Action No. 70-1156, Western District of Pennsylvania, Memorandum Opinion Sur Interlocutory Injunction,

trict court in Pittsburgh denied a motion by the Penn-Central Transportation Company to transfer a passenger train discontinuance case to Penn-Central's reorganization court. And in *In re Penn-Central Transportation Company*, 446 F.2d 1109, 1113 (3rd Cir. 1971), the Third Circuit itself indicated that "matters relating to train discontinuance are not ordinarily heard by the reorganization court."

The Commission's decision authorizing 10 of the 30 line abandonments requested by CNJ was rendered exclusively under the provisions of the Interstate Commerce Act. Accordingly, judicial review of the Commission's decision must, as this Court held in *Thompson*, be before a three-judge district court in conformance with the statutory scheme for reviewing the transportation decisions of the Commission, and the court below was without jurisdiction to alter this mode of judicial review. Compare *Callaway* v. *Benton*, 336 U.S. 132, 142 (1949), where this Court observed that "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate . . . What it did give is exclusive jurisdiction of the debtor and its property wherever located."

Arguments that the decision of the court below is supported by *New Haven Inclusion Cases*, 399 U.S. 392; and *Chicago & North Western Ry. Co.* v. *United*

Conclusion of Law No. 3, dated October 12, 1970, *vacated as moot sub nom. Baker* v. *Pennsylvania*, 401 U.S. 902 (1971). That case was rendered moot by the passage of the so-called Railpax legislation during the litigation.

States, 52 F. Supp. 65 (N.D. Ill. 1943), affirmed *per curiam* 320 U.S. 718, are plainly in error. Those cases dealt with the reorganization court's exclusive jurisdiction to review the Commission's decisions on plans of reorganization; they did not involve review of other decisions of the Commission affecting the railroad, such as abandonment decisions.[8] With respect to abandonment of the debtor's line, § 77(0) of the Bankruptcy Act provides that the trustee shall initially determine what lines should be abandoned in the interest of the debtor's estate and shall present to the reorganization judge petitions for authority to abandon. The judge after notice and hearing may:

> upon order . . . authorizing any such abandonment or sale, but only with the approval and authorization of the Commission *when required by the Interstate Commerce Act* . . . (emphasis added)

The quoted portion of § 77(0) clearly shows that: (1) Congress specifically did not grant any exception to a reorganizing railroad so far as abandonment of line is concerned; and (2) the procedure to be followed in the abandonment proceeding is as "required by the Interstate Commerce Act." Properly read, § 77(0) provides that the trustee and the re-

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[8] In the present case, the Commonwealth of Pennsylvania filed a motion with the Commission to consolidate the CNJ plan of reorganization and its abandonment applications. That motion was opposed by the Trustee of CNJ and denied by the Commission.

organization court should be "concerned only with the economic effect of the abandonment on the debtor's estate and reorganization, and that questions of the effect on public interest are to be left to the Interstate Commerce Commission." *In re Boston and Maine Corporation*, 317 F. Supp. 1249, 1252 (D. Mass. 1970); and *In re Fonda, J. & G.R. Co.*, 95 F. 2d 397, 400 (2nd Cir. 1938). Accordingly, questions of public interest, which pervade an application to abandon rail lines, are to be considered and reviewed under the substantive standards of the Interstate Commerce Act and the procedural scheme of the Urgent Deficiencies Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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